2005

State of Utah v. Vidar Kilicer : Brief of Appellant

Utah Court of Appeals

J. Frederic Voros, Jr; Matthew D. Bates; Counsel for Appellee.
Hakeem Ishola; Ishola Law Firm; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
vs.	)	Dist.Ct.Case No. 041904765
	)	Ct. App. No. 20050406-CA
VIDAR KILICER,	)	
Defendant/Appellant.	)	

APPELLANT'S OPENING BRIEF

APPELLANT'S OPENING BRIEF ON APPEAL FOR REVIEW OF HIS CONVICTIONS FOR THEFT, IN VIOLATION OF UTAH CODE ANN. § 76-6-404, A THIRD DEGREE FELONY, AND BURGLARY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE DENISE LINDBERG, JUDGE PRESIDING.

HAKEEM ISHOLA(#5970)
Ishola Law Firm, P.C.
Attorneys for
Defendant/Appelant
716 East 4500 South, Suite N142
Salt Lake City, UT 84107

J. Frederic Voros, Jr.
Matthew D. Bates
Attorneys for Plaintiff/Appellee
Utah Attorney General's Office
P.O. Box 140854
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
vs.	)	Dist.Ct.Case No. 041904765
	)	Ct. App. No. 20050406-CA
VIDAR KILICER,	)	
Defendant/Appellant.	)	

APPELLANT'S OPENING BRIEF

APPELLANT'S OPENING BRIEF ON APPEAL FOR REVIEW OF HIS CONVICTIONS FOR THEFT, IN VIOLATION OF UTAH CODE ANN. § 76-6-404, A THIRD DEGREE FELONY, AND BURGLARY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE DENISE LINDBERG, JUDGE PRESIDING.

HAKEEM ISHOLA(#5970)
Ishola Law Firm, P.C.
Attorneys for
Defendant/Appelant
716 East 4500 South, Suite N142
Salt Lake City, UT 84107

J. Frederic Voros, Jr.
Matthew D. Bates
Attorneys for Plaintiff/Appellee
Utah Attorney General's Office
P.O. Box 140854
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

ADMINISTRATIVE CASES

CONSTITUTIONAL & STATUTORY PROVISIONS

CONSTITUTIONAL PROVISION

ENABLING FEDERAL LAW

FEDERAL STATUTES

FEDERAL PUBLIC LAWS

FEDERAL REGULATIONS

STATE STATUTES & RULES

OTHER AUTHORITIES

LIST OF PARTIES BEFORE THIS COURT

The list of the parties before this Court are reflected in the caption of the case.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	**APPELLANT'S OPENING BRIEF**
Plaintiff/Appellee,	)	
v.	)	
	)	**Dist. Ct. No. 041904765**
VIDAR KILICER,	)	**Ct. App. No. 20050406-CA**
	)	
Defendant/Appellant.	)	
	)	

STATEMENT OF JURISDICTION OF THIS COURT

This Court obtains statutory jurisdiction over this felony conviction pursuant to UTAH CODE ANN. §§78-2a-3(2)(e) (1953, as amended).

QUESTION PRESENTED FOR REVIEW

A. Issue

The sole issue in this appeal is whether a motion to withdraw guilty pleas by a non-citizen defendant may constitutionally – under the due process and equal protection clauses– be deemed "untimely" when filed within a reasonable time frame of sentencing/judgment (as opposed to before sentence is pronounced as required by § 77-13-6(2)(b)), even when it was factually impossible for the non-citizen defendant to discern trial counsel's ineffectiveness or the involuntariness of the pleas until after sentencing and judgment is pronounced **and** the Department of Homeland Security ("DHS") files a notice of detainer indicating commencement of removal proceedings against the non-citizen, and where the

non-citizen is foreclosed by law from presenting the voluntariness or ineffectiveness issue to **any** forum because of inability to appear "in person" in a post-conviction proceeding as a result of expeditious transfer to another state or removal from the United States by DHS.

B. Preservation of Issues and Propriety of Review

The issue raised here was properly preserved below. *See* R. 73, n.3, and R. 98, n.1. Further, the district court ruled on the issues presented in the motion to withdraw pleas, including the constitutional claim of ineffective assistance of counsel and involuntariness of defendant's pleas. *See* R. 100-102; *cf., e.g., Draper City v. Roper*, 2003 UT App. 631, ¶ 4, 78 P.3d 361. Accordingly, review is proper in this Court. Further, even if not properly preserved in the court below, as trial counsel could not have preserved his own ineffectiveness for appellate review, *see State v. Garrett,* 849 P.2d 578, 580 n.3 (Utah Ct. App.), *cert. denied,* 860 P.2d 943 (Utah 1993), this Court should nonetheless review the issues raised because of the significant constitutional implications. In the alternative, this Court should apply the "plain error" or "exceptional circumstances" doctrine to failure to preserve the issues. *See* Utah R. Evid. 103(d); *Eldredge,* 773 P.2d at 35 & nn.7-12; *State v. Sepulveda,* 842 P.2d 913, 917 (Utah Ct. App. 1992).

C. Standard of Appellate Review

1. The standard of review is whether the district court strictly complied with constitutional and procedural requirements in taking guilty pleas, and is thus a question of law reviewed for correctness. *State v. Smit,* 95 P.3d 1203, 2004 UT App. 222, ¶ 7; *State v.*

Martinez, 2001 UT 12, 26 P.3d 202; *State v. Visser,* 2001 UT App. 215, 31 P.3d 584. The denial of a motion to withdraw guilty plea is reviewed for abuse of discretion, which standard incorporates the clearly erroneous standard in the factual findings sought to be reviewed. *Smit, supra.* Ultimately, whether a district court's ruling is constitutionally sound is a question of law reviewed *de novo*. *See State v. Mohi*, 901 P.2d 991, 1009 (Utah 1995).

2. A plain error analysis requires this Court to view the trial record as a whole to determine if the claim errors seriously affected the fairness of the trial and thus review is for correctness. *See State v. Labrum*, 925 P.2d 937, 939 (Utah 1996); *State v. Eldredge*, 773 P.2d 29, 35 & nn.7-12 (Utah), *cert. denied,* 493 U.S. 814, 110 S. Ct. 62 (1989); *State v. Tarnawiecki*, 2000 UT App. 186, ¶, 6 5 P.3d 1222.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional provisions, statutes and rules are relevant to resolving this case, the relevant portions of which are reproduced verbatim in Addendum E:

United States Constitution, Amendment V;

United States Constitution, Amendment VI;

United States Constitution, Amendment XIV;

Utah Constitution, Article 1, Section 12;

Utah Constitution, Article 1, Section 24;

Utah Code Ann. § 77-13-6 (2004);

Utah Code Ann. § 78-35a-101 *et seq.* (2004);

Utah R. Civ. Pro. 65C(k)

STATEMENT OF THE CASE

A. Nature Of The Case

On May 27, 2003, Defendant and two others allegedly conspired to rob a Pizza Hut and then stole items worth of over $5,000 from the store. *See* R.1-3, 112, at p.3. On November 19, 2004, Defendant entered guilty pleas in the District Court to Burglary, a violation of Utah Code Ann. § 76-6-202, a third degree felony, and Theft, a violation of Utah Code Ann. § 76-6-404, a third degree felony. R.112, at p.4.[1]

B. Course Of Proceeding and Disposition

There were no pre-trial motions of significance filed by the parties. After entering the guilty pleas, the district court sentenced defendant on March 4, 2005, to two indeterminate prison terms of zero to five years; however, the sentences were suspended in lieu of probation and thirty days in jail. R. 66-69.[2] Thereafter, or about April 8, 2005, Defendant filed a motion to withdraw guilty pleas claiming counsel was constitutionally ineffective for misadvising him of the immigration consequences of the pleas, and because his pleas were involuntarily obtained. *See* R. 98-99. On April 14, 2005, the District Court denied

---

[1] Defendant's guilty pleas may not have veen knowing and voluntary in light of his refusal to acknowledge that he entrered the store with intent to commit a theft. *See* R. 112, at p.3. Mr. Steven McCaughey, attorney at law, was of significant help in this brief.

[2] Although not currently incarcerated by the state of Utah, Defendant is in the custody of the United States Department of Homeland Security in Eloy, Arizona, as a result of the conviction and sentence. *See* Addendum C.

Defendant's motion to withdraw guilty pleas. R.100-102; Addendum A. An appeal ensued to this Court on April 27, 2005. R.103-104. On July 5, 2005, this Court withdrew its *sua sponte* motion for summary disposition. *See* Addendum D.

STATEMENT OF THE FACTS

Defendant is a 20-year old native and citizen of Turkey, who entered the United States with his father at age 8. He attended elementary through high schools in the United States – in California, and finally graduated from Cottonwood High School in Salt Lake City, Utah. He is a lawful permanent resident alien ("LPR") who acquired that status in 2004 as a ward of the State of Utah through DCFS, pursuant to 8 U.S.C. § 1101(a)(27)(J), after having demonstrated that his parents had abandoned him at the lonely age of 12. *See* Immigration and Nationality Act ("INA") § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J). Defendant desires to join the United States Marines, as he is fluent in Turkish and English languages. R.71-72.

The State alleges that on May 27, 2003, Defendant and two others robbed a Pizza Hut and stole items worth of over $5,000. *See* R.1-3, 112, at p.3. On November 19, 2004, Defendant entered guilty pleas to Burglary and Theft, both third degree felonies. R. 112, at p.4. The convictions entered against Defendant, without a doubt, render him deportable to Turkey as an "aggravated felon" to which there is no relief from deportation. R.72; *see also* INA §§ 237(a)(2)(a)(iii) & 101(a)(43)(G), 8 U.S.C. §§1227(a)(2)(A)(iii) & 1101(a)(43)(G); *State v. Rojas-Martinez,* 2003 UT App. 203, 73 P.3d 967 (discussing ramifications of an "aggravated felony" conviction), *cert. granted,* 80 P.3d 152 (Utah, Dec. 2003); *Matter of*

Adetiba, 20 I. & N. Dec. 506(BIA 1992); *Jafar v. INS*, 77 F.Supp.2d 360, 364-65 (W.D.N.Y. 1999) (a sentence to one year term of imprisonment for petit larceny, while a misdemeanor under state law, is an aggravated felony for immigration purposes). *See also, e.g.,* INA § 237(a)(2)(A)(ii), 8 U.S.C. §1227(a)(2)(A)(ii) (which also renders defendant deportable for having been convicted of two crimes involving moral turpitude ["CIMTs"] within five years of becoming an LPR).

On or about March 4, 2005, the District Court sentenced Defendant to two indeterminate prison terms of zero to five years; however, the sentences were suspended in lieu of probation and thirty days in jail. R. 66-69. Defendant is currently detained by DHS in Eloy, Arizona. In fact, on July 15, 2005, an immigration judge ordered Defendant removed to Turkey as an "aggravated felon." *See* Addendum C. Defendant is also subject to other harsh penalties as an aggravated felon should he illegally re-enter the United States after deportation. *See id.; see also* INA § 276(b), 8 U.S.C. §1326(b).

Subsequent to sentencing, Defendant filed with the District Court a motion to withdraw guilty pleas on or about April 4, 2005, pursuant to Utah Code Ann. § 77-13-6 (1953, as amended). *See* R.98-99. On April 14, 2005, the Court denied the motion to withdraw the pleas as untimely. R.101-102. This appeal then followed. R.103-104.

SUMMARY OF THE ARGUMENT

This Court held in *Rojas-Martinez* that a non-citizen defendant is entitled to affirmative, sound legal advise regarding the immigration consequences of pleading guilty

to a crime. Trial counsel in this case misadvised Defendant – a lawful permanent resident alien – regarding the immigration consequences of the pleas to two "aggravated felony" crimes which have now resulted in an immigration judge ordering Defendant removed from the United States to Turkey. However, Defendant, like most non-citizens charged with a crime, was unable to (and could not have) discern counsel's ineffectiveness until he was placed in removal proceedings by DHS. Upon finding out trial counsel's error, Defendant immediately moved to withdraw his guilty pleas because of counsel's ineffectiveness and the involuntariness of the pleas.

Mechanically applying the rule that a motion to withdraw a plea must be filed before sentencing, the District Court denied defendant's motion as untimely and thus, in essence, thrust defendant into a post-conviction habeas corpus petition as the only other means to challenge the voluntariness of his pleas. By denying the motion to withdraw pleas, the district court abused discretion and committed reversible error because it failed to consider that Defendant is forever foreclosed from seeking to withdraw his pleas because he has been transferred out of the state of Utah and would therefore be unable to be present "in person" for dispositive hearings as required by the rules governing post-conviction petitions.

Because the district court's decision essentially fails the test recently enunciated by the Utah Supreme Court in *Merrill* – that a due process and equal protection violations occurs whenever a defendant is foreclosed from presenting issues relating to involuntariness of a plea to any forum – the district court must be reversed and the matter remanded for a

hearing on the motion to withdraw pleas to determine if counsel's advice to Defendant on the immigration consequences of the pleas satisfies the *Rojas-Martinez* test.

In remanding the matter, this Court need not find facially unconstitutional § 77-13-6(2)(b), the enabling statute governing motions to withdraw a guilty plea. Rather, the Court will be harmonizing § 77-13-6, consistent with the due process and equal protection mandates of *Merrill*, with the procedural rules governing post-conviction petitions - Rule 65C(k) – as requiring that a non-citizen defendant who has been ordered deported or exiled to another state by DHS must be allowed to withdraw a plea upon promptly filing such a motion when counsel's ineffectiveness is discovered. Such a reasonable time frame need not exceed ninety days, sufficient to allow the non-citizen to explore his options, seek counsel, and file a motion to withdraw plea. To hold otherwise would be contrary to the dictates *of Merrill,* and would render meaningless the core holding by this Court in *Rojas-Martinez* that a guilty plea is infirm if counsel failed to properly advise a non-citizen of the immigration consequences of a plea.

DETAIL OF THE ARGUMENT

POINT I

THE DISTRICT COURT ERRONEOUSLY DENIED AS UNTIMELY DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS FILED WITHIN A REASONABLE TIME PERIOD OF SENTENCING AND UPON DISCOVERING TRIAL COUNSEL'S INEFFECTIVENESS IN MISADVISING HIM OF THE IMMIGRATION CONSEQUENCES OF THE PLEAS, PARTICULARLY WHERE NO OTHER FORUM EXISTS FOR THE NON-CITIZEN DEFENDANT TO RAISE QUESTIONS

RELATING TO THE VOLUNTARINESS OF HIS PLEAS OR COUNSEL'S INEFFECTIVENESS.

A. This Court and the United States Supreme Court have determined that non-citizen defendants must be correctly advised of immigration consequences of guilty pleas lest the pleas be found involuntary or counsel ineffective.

The issues before the Court is of significant due process and equal protection importance. *See,e.g., State v. Rojas*, 2003 UT App. 203 (holding that defense counsel must correctly advice non-citizens of deportation consequences of guilty pleas); *State v. Merrill*, 2005 UT 34,114 P.3d 585, 2005 WL 1367368 (Utah, June 10, 2005) (noting that due process is violated when a class of defendants are deprived of a forum to assert defects in their guilty pleas).

Against the backdrop of fervent congressional activities in criminal-immigration law, the United States Supreme Court in 2001 ruled on whether Congress in AEDPA[3] could retroactively bar deportation relief to LPRs who pleaded guilty to certain deportable offenses prior to the advent of the new immigration laws. In *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001),[4] the Supreme Court discussed at length the importance of an informed plea discussion between non-citizen criminal defendants, their

---

[3] Anti-Terroirsm and Effectcive Death Penalty Act, Publ L. No. 104-132, 110 Stat. 1214 (April 24,1996).

[4] For a thorough analysis of the *St.Cyr* decision, see Ishola, *INS v. St. Cyr: The Supreme Court and Draconian Congressional Criminal-Immigration Laws*, 14 Utah Bar Journal 9 (Dec. 2001).

attorneys, and the prosecution.[5] The Supreme Court recognized that the nature and timing of plea agreements are very critical in determining whether a non-citizen who has committed a crime is deported or remains in the United States. *See id.* The *St. Cyr* Court finally laid to rest and rejected the argument that deportation is "prospective" or "collateral" and, as the argument further goes, whether an alien was not advised or misadvised of the immigration consequences of a plea does not implicate a guilty plea in a criminal proceeding:

> The INS argues that deportation proceedings (and the Attorney General's discretionary power to grant relief from deportation) are "inherently prospective" and that, as a result , application of the law of deportation can never have a retroactive effect. Such categorical arguments are not particularly helpful. . . .

St. Cyr, 533 U.S. at 324, 121 S.Ct. at 2292. The Court then discussed the importance of an effectively-counseled plea agreement between a non-citizen, the defense counsel, and the government:

> Plea agreements involved *quid pro quo* between a criminal defendant and the government. *See Newton v. Pumery*, 480 U.S. 386, 393, n.3, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). In exchange for perceived benefits, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous "tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources." *Id.*

Id., 533 U.S. at 322-323, 121 S.Ct. at 2291. The Supreme Court then reiterated the

---

[5] *See St. Cyr,* 533 U.S. at 323, n. 48 (chronicling how the States have responded to dealing with the criminal aliens and guilty pleas).

importance of effective assistance of counsel at this stage of criminal proceedings, quoting with approval that **"if a defendant will face deportation as a result of the conviction defense counsel should fully advise the defendant of these consequences**." *Id.* at 323, n.51 (C*iting* ABA Standards for Criminal Justice, 14-3.2 Comment, 75 (2d ed. 1982) (emphasis supplied)).

The foregoing lengthy discussion in *St. Cyr* of the importance of a plea agreement between non-citizen criminal defendants, their attorneys, and the prosecution is a recognition by the Court that, with the advent of IIRIRA[6] the nature and timing of plea agreements become highly critical in determining whether a non-citizen who has committed a crime is deported or remains in the United States. Indeed, the Supreme Court explicitly recognized that deportation under IIRIRA for an aggravated felon is no longer an academic exercise, for "[t]here is a clear difference between facing possible deportation and facing certain deportation." *Id.,* 533 U.S. at 325, 121 S.Ct. 2293. An "aggravated felon," as stated above, simply does not face deportation; rather, he or she faces, as the Supreme Court held, certain deportation because of the irrebutable presumption of deportability. *See id.*

Furthermore, other appellate courts have recently ruled on the thorny question of the level of competent advice to be give a non-citizen criminal defendant at the guilty plea phase. *See, e.g., State v. Rojas-Martinez*, 73 P.3d 967 (Utah). In *In re Resendiz*, 25

---

[6] Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

Cal.4th 230, 105 Cal. Rptr.2d at 445-46, 19 P.3d at 1185,[7] a more recent and lengthy analysis by the California Supreme Court of the role of defense counsel during plea negotiations with a non-citizen, the court found that counsel's statement that defendant would have no immigration problems constitutes affirmative misrepresentation. *See id.*; *see also Gonzalez*, 83 P.3d 921, 924-25 (Ore. Ct. App.2004) ("Because the current immigration scheme all but requires that aliens convicted of aggravated felonies be deported, we conclude that Petitioner's trial counsel was obligated to tell Petitioner that he was pleading guilty to an aggravated felony and that, unless the United States Attorney general or his designee chose not to pursue deportation proceedings against Petitioner, he would be deported as a result of his guilty plea.").

Defense counsel's statement in the instant case that Defendant "may not" be deported" as a result of pleading guilty to two aggravated felony offenses is on par with, and indistinguishable from, counsel's statement in *Gonzalez* that Petitioner "may" be subject to deportation. Both statements were patently calculated by counsel to mislead, and to avoid and deflect responsibility — the responsibility to investigate and research the nature of the potential conviction, its characterization under federal criminal-immigration law, and its impact on defendants' contemplated plea.

B. As Applied, the District Court's Interpretation of Utah Code Ann. § 77-13-6(2)(b) as precluding Defendant's motion to withdraw pleas filed

---

[7] Although decided some few months before *St. Cyr*, *Resendiz* portends what was to come in the former, reaching the same doctrinal conclusion on the importance of well-informed plea bargain between counsel and a non-citizen defendant. *See* 25 Cal. 4th at 230.

within a reasonable period after sentencing violates Due Process and Equal Protection Because There is No Other Forum in Which Defendant Could Assert the Involuntariness of His Guilty Pleas and Ineffectiveness of Trial Counsel Once He is Exiled by DHS to Arizona and/or Expeditiously Removed from the United States and thus Cannot Be "Present" for His Post-Conviction Relief Hearing as Required by Rule 65C(k).

1. As Applied Due Process Violation

Due Process requires that the State prove beyond a reasonable doubt that the defendant committed a crime in order to sustain a conviction. *In re Winship*, 397 U.S. 358, 361-63, 90 S.Ct. 1068 (1970). Due process also requires that if the defendant does not hold the State to its requisite burden of proof and instead pleads guilty, it is axiomatic that the guilty plea itself must be knowingly and voluntarily made. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). As the Supreme Court noted in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938),

> A defendant who enters such a plea [a guilty plea] simultaneously waives several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege.

Because there are questions regarding whether Defendant's pleas were knowing and voluntary and whether counsel was constitutionally ineffective for failing to apprise him of the deportation consequences of the pleas, this Court must find that, as applied, the requirement of § 77-13-6(2)(b) is directory and immediately remand the case to decide whether Defendant's pleas were voluntary before he is expeditiously removed

from the United States and loses the right to challenge his conviction under the Post-Conviction Remedies Act, for he would unable to be "present" at his hearing as required by Rule 65C(k). *See* Utah Code Ann. § 78-35a-101; Utah R. Civ. P. 65C(k). The court in *Johnson* provides further guidance on the due process of law required for guilty pleas, stating,

> [I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot truly be voluntary unless the defendant possesses an understanding of the law in relation to the facts.

Id. at 466; *see also Julian v. State*, 966 P.2d 249, 254 (Utah 1998) (referring to due process in a criminal proceeding as a fundamental right); *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572 (1941) (noting that a plea cannot be voluntary unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.").

As further elucidated below, non-citizen defendants, like Defendant, do not have a means by which they can re-appear before the trial court and have these due process rights enforced if they do not file a motion to withdraw their pleas immediately upon discovering counsel's ineffectiveness and commencement of removal proceedings, and are immediately deported from the United States pursuant to federal immigration laws. *See* INA §§ 237, 238, 8 U.S.C. §§ 1227, 1228 (mandating expeditious removal of aggravated felons). Thus, interpretation by the district court of § 77-13-6(2)(b), which

the court found as barring her from hearing the "untimely" motion to withdraw pleas for this non-citizen Defendant, violates due process since the court has not determined whether the plea was knowing and voluntary.

2. Equal Protection Violation

In addition, the district court's interpretation of § 77-13-6(2)(b) violates equal protection and uniform operation of laws by differentiating between defendants who can withdraw their illegally-obtained pleas based solely on the time at which the defendant files a motion to withdraw. The Equal Protection clause provides protection to all persons similarly situated. *See* U.S. Const. amend. XIV; *see also* Utah Const. art. I, § 24. When legislation creates classifications that impinge upon a fundamental interest, the statute is upheld only if it furthers a compelling state interest. *See State in the Interest of N.R.*, 967 P.2d 951, 953-54 (Utah App. 1998); *Carey v. Brown,* 447 U.S. 455, 461-62, 100 S.Ct. 2286 (1980) (strict scrutiny test requires that "the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"); *Mohi*, 901 P.2d at 995 (statute must be reasonable in relation to state's need to enact it).

Article I, section 24 of the Utah Constitution similarly requires that all laws have uniform operation. *See* Utah Const. art. I, § 24. At least in the context of economic legislation, this constitutional protection is as rigorous as the protection provided by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

See Blue Cross and Blue Shield of Utah v. State, 779 P.2d 634, 637 (Utah 1989). The Utah Supreme Court has indicated that the tests of "strict scrutiny" and "rational basis" are not helpful in assessing whether legislation violates the uniform operations of the law provision. *See Ryan v. Gold Cross Services, Inc.*, 903 P.2d 423, 426 (Utah 1995). Rather than employing strict scrutiny or rational basis tests, the analysis for determining whether a statute violates Article I, section 24 is "(1) whether the classification is reasonable, (2) whether the legislative objectives are legitimate, and (3) whether there is a reasonable relationship between the two." *Id.* at 426 (citing *Blue Cross*, 779 P.2d at 637).

The right in a criminal case to have the state prove its case beyond a reasonable doubt and the concomitant due process right to be convicted of a crime based on a plea of guilty only when the plea is knowingly and voluntarily made, are of fundamental importance. *See Julian*, 966 P.2d at 254 (referring to deprivation of due process in a criminal proceeding as a fundamental right); *Lyon v. Burton*, 2000 UT 19, ¶20, 5 P.3d 616 ("A just and peaceful society must secure by law the fundamental rights of all its citizens"; these fundamental rights include criminal law sanctions); *accord State v. Merrill,* 2005 UT 34, 114 P.3d 585, 2005 WL 1367368 (Utah). Moreover, these due process rights directly implicate the right to liberty and therefore are fundamental. *See Chapman v. United States*, 500 U.S. 453, 465, 111 S.Ct. 1919 (1991) (further citation omitted) ("Every person has a fundamental right to liberty in the sense that the

Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees."). Because, as applied here, the ruling in the district court directly subjugates a non-citizen criminal defendant's exercise of his due process rights and liberty interests to the requirement provided by § 77-13-6(2)(b), the statute is subject to strict judicial scrutiny under equal protection analysis. *See, e.g., Ryan v. Gold Cross Services, Inc.*, 903 P.2d at 426.

The State clearly does not have a compelling need to limit the time in which a non-citizen defendant can move the court to withdraw an illegal plea to before sentence is pronounced. In fact, the Supreme Court has recognized that the state's interest in limiting the time in which a defendant can challenge a due process violation is not significantly compelling to warrant the imposition of a statute of limitations of habeas petitions. *See Julian*, 966 P.2d at 254. The Court's statement in *Julian* that "if the proper showing is made, the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights, regardless of how difficult it may be for the State to re-prosecute the individual" resolves the question of whether the State has a compelling interest that would justify the classification. *Id.* Because the state's interest in reprosecuting the individual in a speedy fashion does not justify a time limit on claiming a deprivation of fundamental rights, section 77-13-6(2)(b) violates equal protection.

Application of Article I, Section 24 uniform operations of the law test also demonstrates that the district court's interpretation of § 77-13-6(2)(b) is unconstitutional as applied here. If the requirement to file a motion to withdraw plea under § 77-13-6(2)(b) were considered jurisdictional, the statute would violate uniform operation of laws with respect to non-citizen defendants. First, the statute would classify those defendants who can obtain immediate relief from an unconstitutional plea through a motion to withdraw and/or post-conviction relief, and those who cannot as a result of alienage and because of rapid exile or deportation from the United States by DHS.

The classes would be subjected to significantly disparate treatment, not only because of the passage of time a defendant may spend incarcerated while going the more circuitous route through appeal and post-conviction proceedings, but also because the post-conviction statute and its concomitant procedural rule require that the habeas or post-conviction petitioner be "present" all hearings on dispositive motions. *See* Utah Code Ann. § 78-35a-101; Rule 65C(k), Utah Rules of Civil Procedure.

In addition, the legislative objectives are not compelling. There is no reasonable objective to warrant such disparity between citizen defendants who may file motions to withdraw pleas and also seek post-conviction relief, and non-citizen defendants who may not file such a motion or post-conviction petition because of expedited removal proceedings and state procedural law mandating their presence on all dispositive motions when, in all reality, such non-citizens *shall* remain in the custody of DHS throughout

removal proceedings until they are ordered deported by an immigration judge. *See* INA § 236©), 8 U.S.C. § 1226©); *Demore v. Kim*, 538 U.S. 510, 123 S.Ct. 1708 (2003) (finding that mandatory detention of non-citizens in "civil" immigration proceedings does not violate due process).

Again, while the Supreme Court has acknowledged the state's concerns about the increased difficulty in prosecuting a case after time has elapsed, it has specifically rejected the notion that such increased difficulties establish an adequate basis for depriving an individual of fundamental rights based solely on the passage of time. *See Julian*, 966 P.2d at 254. In this particular case, the requirement that a motion to withdraw a plea be filed prior to sentencing by a non-citizen defendant unaware of counsel's ineffectiveness until removal proceedings are commenced is acutely unfair and deprives the non-citizen defendant of fundamental rights simply because of alienage, as he could be exiled or deported before commencement of a lengthy post-conviction relief petition. Further, because the post-conviction law requires that the petitioner be present in court on dispositive motion, the State has by all means foreclose **all** avenues in which a non-citizen defendant in removal proceedings may seek to challenge the voluntariness of his guilty plea or allege counsel's ineffectiveness.

Defendant reiterates that he raises no wholesale, facial constitutional challenge to § 77-13-6. Axiomatically, whenever possible, a statute must be interpreted so as not to conflict with constitutional requirements. *See State v. Mohi*, 901 P.2d at 1009. The

district court's interpretation of § 77-13-6(2)(b) violates due process and equal protection for the reasons stated above. Accordingly, that interpretation should be rejected and this Court should hold that the requirement that a motion to withdraw pleas as provided by § 77-13-6(2)(b) is directory only and in no way creates a jurisdictional bar to a trial court hearing a motion to withdraw a guilty plea for a non-citizen defendant who, as this Court found in *Rojas-Martinez*, is entitled to sound legal advise on the immigration implications of a guilty plea, who is usually unaware and thus unable to assert that right until DHS commences removal proceedings, and who may forever be barred from asserting the right in any forum because of exile to another state or expedited removal from the United States by DHS, and thus cannot be "present" in PCRA proceedings as required by Rule 65C(k).

The same concerns that led the Supreme Court to reject the statute of limitations in habeas cases apply in the instant case. Precluding a trial court from hearing a motion to withdraw a guilty plea entered in that court "remove[s] flexibility and discretion from state judicial procedure, thereby diminishing the court's ability to guarantee fairness and equity in particular cases." *Julian*, 966 P.2d at 253 (citation omitted). Just as the writ of habeas corpus provides an essential protection of fundamental rights and offers a remedy for violations of due process, a trial court's authority to withdraw an unconstitutional plea, particularly when the request is made within 90 days or a reasonable period after sentencing, protects fundamental rights by providing a remedy for violations of due

process that occur in taking pleas. Phrased differently, allowing a trial judge to hear a meritorious motion to withdraw a plea when the motion is filed within 90 days of sentencing allows the judicial branch to fulfill its role as a distinct and separate branch of government and its duty to fairly and equitably administer justice.

Most importantly, when a plea is taken in direct violation of due process, a defendant has been wrongfully incarcerated and any failure to re-examine the conviction would be unconscionable. *Id.* at 253. Since "the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights" (id.), a non-citizen defendants must be given some access to the courts in order to challenge his convictions obtained in violation of his constitutional rights.

3. Recent Utah supreme court decision supports Defendant's position

Admittedly, just a few months ago, in *State v. Merrill*, 2005 UT 34, 114 P.3d 585, 2005 WL 1367368, rebuffing a due process challenge to the thirty-day limitations period in former § 77-13-6,[8] the Utah supreme court found that the statute is jurisdictional and facially constitutional. However, the Court stated that "[w]hile an unknowing or involuntary guilty plea is likely to constitute a denial of due process, *an absolute prohibition against providing a forum to a defendant in which he may assert defects in his guilty plea would certainly violate due process guarantees.*" *Id.*, ¶¶ 8-9, 114 P.3d at

---

[8] Section 77-13-6 has been significantly amended since *Merrill*. For the purposes of the instant case, the statute now requires a motion to be filed prior to sentencing, as opposed to within thirty days of entering a plea. *See* UCA § 77-13-6(2)(b) (2005).

592, 2005 WL 1367368, at * 6 (emphasis added).

With respect to the equal protection challenge, the Supreme Court in *Merrill* also noted that "some access to the courts for the purpose of reviewing the lawfulness of a guilty plea is a fundamental right." *Id.*, ¶ 13, 14 P.3d at 592, 2005 WL at *9. The Court goes on to state that members of the class covered by the statute joined the class by choice:

> Section 77-13-6 extends to each of these defendants the opportunity to obtain relief from the consequences of his plea by filing a motion within thirty days of a final judgment. No defendant is consigned to the disadvantaged class merely because he pleaded guilty. Instead, each enjoys an equal opportunity to avoid whatever disadvantages might attend the PRCA by moving to withdraw his guilty plea within the thirty-day statutory period. In this way, the classification created by the statute is conditional and contingent, and membership in the class is voluntary. It "applies equally" to all defendants who plead guilty, including those whose guilty pleas were unlawfully obtained or who, for some other reasons, may be entitled to withdraw their pleas.

Id., ¶13 (emphasis supplied).

Merrill, as earlier stated, is distinguishable from the instant case in that *Merrill* dealt with a citizen defendant who was not subject to deportation and may be "present" at dispositive PCRA proceedings as required by Rule 65C(k). On the other hand, the instant case crystalizes the dilemma of a non-citizen criminal defendant attempting to withdraw a guilty plea, but who was unaware of counsel's ineffectiveness prior to sentencing and entering of judgment, and who is forever foreclosed from seeking to withdraw his pleas as a result of expeditious deportation from the United States or, as

here, one exiled to another state and thus cannot be "present" for PCRA proceedings. It is axiomatic that most non-citizen defendants are usually unaware of the deportation consequences of their guilty pleas until DHS files a detainer[9] and commences removal proceedings. *See,e.g., United States v. Singh*, 305 F.Supp. 2d 109 (D.D.C. 2004); Affidavit of Hakeem Ishola, attached as Addendum E [previously attached as Addendum A to defendant's opposition to *sua sponte* motion for summary disposition]. Further, it is a "conviction" as defined by federal immigration laws that triggers removal proceedings. *See* INA §101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) ("the term 'conviction' means, with respect to an alien, . . . a judge or jury has found he alien or guilty or the alien has entered a plea of guilty or nolo contendere. . ."); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). Further, the filing of a notice of appeal in an appeal of right (direct appeal) ordinarily stays a non-citizen's deportation, whereas the filing of a post-conviction petition – the so-called collateral challenge – as contemplated in PCRA does not. In other words, an appealed judgment to the first appellate court is not considered a "conviction" for immigration purposes whereas a post-conviction petition is given no weight in removal proceedings. *See,e.g., Will v. INS*, 447 F.2d 529 (7th Cir. 1971); *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976); *Matter of Thomas*, 21 I. & N. Dec 20, 21 n.1 (BIA 1995). The fact that immigration laws render deportable aliens who are

---

[9] "The INS (now DHS) often places a notice with federal or state prison officials called a "detainer," requesting the Bureau of Prisons or its equivalent to notify INS if they intend to release the detained alien or hold the alien for INS. 8 C.F.R. §§ 236.1, 287.7. Kurzban, *Immigration Law Sourcebook* 216 (8th ed. 2002).

collaterally attacking their convictions in a habeas petition but not those who have filed direct appeals of their convictions is further indicative of the need to allow non-citizens who have been erroneously convicted to withdraw their pleas upon promptly demonstrating the involuntariness of the pleas.

In sum, most non-citizen defendants are unaware of the deportation consequences of their guilty pleas until DHS files a detainer and commences removal proceedings after a judgment is obtained. This Court has found that counsel may be constitutionally ineffective and thus guilty pleas involuntary for failure to advise a non-citizen of deportation consequences of a plea. *See Rojas-Martinez, supra.* By requiring a non-citizen defendant to move to withdraw his pleas prior to sentencing and prior to being aware of the possibility of deportation and ineffective assistance of trial counsel, the amended § 77-13-6 puts the cart before the horse, and impermissibly denies this class of people due process and equal protection. Therefore, unlike *Merrill,* Defendant belongs to a discrete and insular minority class who is deprived of the right to assert defects in their pleas in **any** forum. *See Merrill, supra.*

Phrased differently, Defendant believes that non-citizens defendants, like him, are denied any forum to challenge the voluntariness of their pleas because the statute now requires that a guilty plea be withdrawn prior to sentencing (not within "30 days of a final judgment" as contemplated by *Merrill*), and the concomitant procedural rules requiring PCRA petitioners be present clearly forecloses any forum for the non-citizen

aggravated felon who is either in DHS custody in another state or has been expeditiously removed from the United States. Therefore, the requirement that a motion to withdraw a plea be filed before sentencing works particular hardship on a non-citizen criminal defendant and prevents him from a forum to seek redress as the non-citizen is usually deported immediately upon entering a plea and being found by the immigration judge to have been "convicted," and has not filed a direct appeal. *See, e.g.*, Addendum D (IJ ordering defendant removed to Turkey as a result of two aggravated felony convictions).

Accordingly, because a post-conviction petition may exonerate a citizen and erases the stigma of conviction, a non-citizen defendant does not enjoy that benefit as he would have been deported with no opportunity for further relief. The difference, therefore, between the treatment of a citizen and non-citizen under § 77-13-6 and the PRCA highlights the denial of a uniform operation of the law to the former.

CONCLUSIONS AND PRECISE RELIEF SOUGHT

For the reasons specified above, this Court should reverse the decision of the district court and remand the matter for proceedings consistent with the Court's opinion.

RESPECTFULLY SUBMITTED this 18th day of August, 2005.

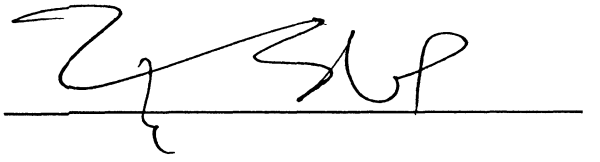
ISHOLA LAW FIRM, P.C.
Attorneys for Defendant-Appellant

By _____
HAKEEM ISHOLA

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing Appellant's Opening Brief was mailed by first-class postage prepaid this 18th day of August, 2005, to:

J. Frederic Voros, Jr.
Matthew D. Bates
Assistant Attorneys General for the State of Utah
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854



ADDENDA

Addendum "A"

Memorandum Decision of the District Court

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH	:	
Plaintiff,	:	MINUTE ENTRY and DECISION
	:	DENYING DEFENDANT'S MOTION TO
vs.	:	WITHDRAW GUILTY PLEAS/WRIT OF
	:	CORAM NOBIS
VIDAR KILICER,	:	
Defendant.	:	Case No.: 041904765
	:	Judge Denise Posse Lindberg

¶1 Before the court is Defendant's April 8, 2005 motion to withdraw his guilty pleas. On November 14, 2004 defendant entered guilty pleas to one count of Burglary, a third degree felony, in violation of Utah Code § 76-6-202, and to one count of Theft, also a third degree felony in violation of Utah Code § 76-6-404. On March 4, 2005 defendant was sentenced to two indeterminate terms of 0-5 years at the state prison. That prison term was stayed and Defendant was placed on supervised probation through Adult Probation and Parole, subject to his serving 30 days in jail and completing other conditions of probation. Defendant has now completed his 30-day jail term but remains incarcerated at the Summit County Jail as a result of a detainer lodged by the Department of Homeland Security. Defendant faces removal proceedings as an "aggravated felon" as a result of these convictions and is now subject to deportation under applicable laws of the United States. Defendant claims that at the time he plead to these crimes, he was not aware that the crimes would be grounds for deportation and further that his plea was the result of misinformation provided by his counsel at his pleading colloquy.

¶2 Defendants do not have an unqualified right to withdraw their guilty pleas. Pursuant to Utah Code § 77-13-6(2)(a), a guilty plea may be withdrawn only upon leave of Court and a showing that it was not knowingly and voluntarily made. More importantly for present purposes, under subsection (2)(b) of that section, "[a]request to withdraw a plea of guilty . . . shall be made by motion before sentence is announced." Utah Code § 77-13-6(2)(b) (2004) (emphasis added). Following pronouncement of sentence, the Court loses jurisdiction to address plea issues except for correction of an illegal sentence under Utah R. Crim. P. 22(e). See, e.g., Utah v. Tarnawiecki, 5 P.3d 1222, 1225 (Utah Ct. App. 2000. The sentence imposed in this case was not an illegal sentence subject to correction under Utah R. Crim. P. 22(e). In fact, Utah R. Crim. P. 11(e) expressly provides that "[u]nless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea." [1]

[1] Deportation is a "collateral consequence" of conviction. State v. McFadden, 884 P.2d 1303, 1304-05 (Utah Ct. App. 1994). Although an attorney's failure to advise a defendant of the possibility of deportation does not constitute ineffective assistance of counsel, id., an affirmative

¶3 Defendant's reliance on State v. Rojas-Martinez, 73 P.3d 967, 969 (Utah Ct. App. 2003) is misplaced. In that case, Rojas-Martinez timely filed his motion to withdraw the plea under then-existing law. However, in 2004 the Utah legislature amended § 77-13-6 to provide expressly that withdrawals of pleas may be made, if at all, only up to the time of sentencing[2] Here, Defendant's motion to withdraw his plea was filed more than a month after he was sentenced. Under § 77-13-6(2)(c), Defendant's only remedy lies under the Utah Post-Conviction Remedies Act and Rule 65C of the Utah Rules of Civil Procedure.

¶4 Defendant also brings this motion pursuant to a "writ of coram nobis." A writ of coram nobis seeks review of a judgment on the ground that judgment would not have been rendered but for mistakes of fact which were unknown to the trial court and the parties. State v. Woodward, 108 Utah 390, 391, 160 P.2d 432, 433 (1945). *See also* Sullivan v. Turner, 22 Utah 2d 85; 448 P.2d 907 (Utah 1968). Coram nobis is a limited remedy of narrow scope and is available, where no other remedy exists, to correct errors of fact, not errors of law. Lopez v. Shulsen, 716 P.2d 787 (Utah 1986). As noted in the preceding paragraph, § 77-13-6(2)(c) expressly provides for a remedy under Utah law; accordingly, relief by writ of coram nobis is unavailable.[3] The motion is DENIED.

SO ORDERED this 14th day of April, 2005.

Denise Posse Lindberg, Third District Court Judge

misrepresentation of deportation consequences has been found to be ineffective assistance of counsel. State v. Rojas-Martinez, 73 P.3d 967, 969 (Utah Ct App. 2003).

[2] Except in pleas in abeyance, not at issue here, in which case a defendant must move to withdraw his plea, if at all, within 30 days from the time he pled guilty.

[3] It is unclear whether Utah law still recognizes the writ of coram nobis. According to Black's law dictionary, this writ was abolished by adoption of Fed. R. Civ. P. 60(b) and superseded by relief provided by that rule. Black's Law Dictionary (5th ed.).at 304-05. Given that Utah's rules of civil procedure, including R. 60(b), are modeled on the federal rules, and that all reported Utah cases discussing this writ predate the adoption of the current rules, it may well be that the writ is no longer available.

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of April, 2005, I mailed a true and correct copy of the foregoing notice concerning disposition of funds, postage prepaid thereon, to the following:

Clark A. Harms
Deputy District Attorney
Salt Lake County District Attorney's Office
111 East Broadway, Suite 400
Salt Lake City, Utah 84111

Hakeem Ishola
Ishola Law Firm, P.C.
Attorneys for Defendant
716 East 4500 South, Suite -142
Salt Lake City, Utah 84107

BY: Laurie Barrett
DEPUTY CLERK

Addendum "B"

Transcript of Guilty Plea Hearing

IN THE THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 041904765 FS
	:	
Plaintiff,	:	Appellate Case No. 20050406-CA
	:	
v	:	
	:	
VIDAR KILICHER,	:	
	:	
Defendant.	:	

CHANGE OF PLEA NOVEMBER 19, 2004

BEFORE

THE HONORABLE DENISE P. LINDBERG

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

SALT LAKE CITY, UTAH - NOVEMBER 19, 2004

JUDGE DENISE P. LINDBERG PRESIDING

For the Plaintiff: Patricia Parkinson

For the Defendant: John D. O'Connell, Jr.

THE COURT: And we have Mr. Kilicher set for disposition.

MS. PARKINSON: Your Honor, if I may approach, I have an amended information.

THE COURT: All right. And under this amended information that the State has just filed with the court, Mr. Kilicher is charged with one count of theft, a third degree felony, amended down from a first.

MR. O'CONNELL: I'm not sure - there's a count theft and a count burglary.

THE COURT: And a count of burglary. Sorry, I missed that, also is a third degree felony.

MR. O'CONNELL: Right.

THE COURT: And is it Mr. Kilicher's intention to plead to these matters?

MR. O'CONNELL: That's correct.

THE COURT: And has Mr. Kilicher had a chance to review the Statement of Defendant?

MR. O'CONNELL: He has.

THE COURT: And Mr. Kilicher?

THE DEFENDANT: Yes.

THE COURT: Did you read it personally or have it reac to you?

THE DEFENDANT: I followed along as he read it to me.

THE COURT: Did you understand everything that was covered?

THE DEFENDANT: Yes.

THE COURT: Do you have any remaining questions that I can answer for you about anything in there?

THE DEFENDANT: The only question I have is this person in here?

MR. O'CONNELL: Oh, I'm prepared to answer that. He's just wondering (inaudible) the information.

THE DEFENDANT: Yeah, the evidence obtained, Ms. Martinez Cruse. I'm curious about that.

THE COURT: I'm afraid I would not have any information to give you on that.

MR. O'CONNELL: And I probably don't either. It really has no effect on the plea (inaudible).

THE COURT: Right. Mr. Kilicher, you are pleading to two counts, each of which could carry penalties of up to five years in prison and fines of $5,000 plus an 85 percent surcharge and those could be run consecutive to each and cumulative in terms of the fines. Do you understand?

THE DEFENDANT: Yes.

THE COURT: By your plea you would be admitting that

on or about May 27 of 2003 at 5575 South 900 East in Salt Lake County, you obtained or exercised unauthorized control over the property of Pizza Hut with the purpose of depriving the owner of the value of that property; that the value of that property was a thousand, between a thousand and $5,000. And also that on or about that same date and location you entered or remained unlawfully in the building of another with intent to commit a theft.

THE DEFENDANT: I don't know about that, I didn't enter the building.

MR. O'CONNELL: Just a second. He wasn't the one that actually entered. He assisted another who he drove -

THE COURT: Okay, so that charge is as a party.

MR. O'CONNELL: As a party.

THE COURT: Party liability. Do you understand that if you aided and abetted and assisted in that then you are charged with the same.

Oh, yes, this was you and your buddies. You are the one that is living with - is it Mr. Bradford?

THE DEFENDANT: Yes.

THE COURT: Mr. Kilicher, have you had enough time to discuss this matter with your attorney?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the advice you received?

THE DEFENDANT: Yes.

THE COURT: Are you being forced in any way into this plea?

THE DEFENDANT: No.

THE COURT: Has anything else been promised to you? I mean you've already received a substantial reduction through the amendment.

THE DEFENDANT: No.

THE COURT: Are you today under the influence of anything that would affect your ability to enter this plea?

THE DEFENDANT: No.

THE COURT: Then how do you plead to this count -

THE DEFENDANT: Guilty.

THE COURT: - these two counts theft and burglary?

THE DEFENDANT: Guilty on all.

THE COURT: If you would go ahead and sign.

Alright, Mr. Kilicher, I'm going to accept your plea as a knowing and voluntary plea. If you would go ahead and sign the form if you haven't already. Oh, you did.

THE DEFENDANT: Yes.

THE COURT: Never mind, I'm signing it. Of course you did. You have until the day of sentencing as the maximum time to withdraw the plea.

THE DEFENDANT: Okay.

THE COURT: You would have to give me a good reason in

writing on why you would want me to withdraw the plea.

THE DEFENDANT: Okay.

THE COURT: All right. We'll refer you for a pre-sentence report.

And I'm going to need to have him waive the time because of the holidays.

MR. O'CONNELL: That's fine, Your Honor. That would be our preference too.

THE COURT: We'll set this for January 7th. You'll have to report to AP&P within the next two or three business days and I'll see you on the 7th.

(Whereupon the hearing was concluded)

-c-

Addendum “C”

Immigration Judge Order of Removal

[illegible] Immigration Court
[illegible] HANNA RD.
FLOR AZ 85231

In the Matter of

Case No: A95-219 307

MILLER, VIDAR
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jul 15, 2005. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Turkey or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to

[ ] Respondent's application for voluntary departure was granted until ____ upon posting a bond in the amount of $ _____ with an alternate order of removal to

Respondent's application for:

[X] Asylum was ( ) granted (X) denied ( ) withdrawn

[X] Withholding of removal was ( ) granted (X) denied ( ) withdrawn

[ ] Waiver under section ___ was ( ) granted ( ) denied ( ) withdrawn

[ ] Cancellation under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. It is granted it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Adjustment of status under section 245 was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all documents necessary to give effect to this order.

[X] Respondent's application for ( ) withholding of removal (X) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ____ until _____

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Jul 15, 2005

STEVEN KEEGAN
Immigration Judge

8/15/05

Resident

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (X) PERSONAL SERVICE ( )

TO: (X) ALIEN ( ) ALIEN'S Custodial Officer (X) ALIEN'S ATTORNEY (X) INS

DATE: 8/15/05 BY: COURT STAFF _____

Attachments: ( ) None ( ) Brief ( ) Exhibits ( ) Legal Services List ( ) Other

Addendum "D"

Court of Appeals Order Withdrawing Sua Sponte Motion to Dismiss

THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	
	)	ORDER
Plaintiff and Appellee,	)	
	)	Case No. 20050406-CA
v.	)	
	)	
Vidar Kilicer,	)	
	)	
Defendant and Appellant.	)	

This matter is before the court on a sua sponte motion for summary disposition.[1]

IT IS HEREBY ORDERED that the sua sponte motion for summary disposition is withdrawn, and a ruling on the issues raised therein is deferred pending plenary presentation and consideration of the case. See Utah R. App. P. 10.

Dated this 5 day of July, 2005.

FOR THE COURT:

Norman H. Jackson, Judge

1. Kilicer also filed a motion to file an overlength memorandum. That motion is resolved through this order and the entire memorandum was considered.

Addendum “E”

Affidavit of Hakeem Ishola filed with Response to Sua Sponte Motion to Dismiss

Hakeem Ishola, Utah State Bar #5970
ISHOLA LAW FIRM, P.C.
Attorneys for Defendant-Appellant
716 East 4500 South, Suite N142
Salt Lake City, Utah 84107
Telephone: (801) 269-9541
Facsimile: (801) 269-9581

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	**AFFIDAVIT OF HAKEEM ISHOLA**
Plaintiff/Appellee,	:	
v.	:	**Lower Court No. 041904765**
VIDAR KILICER,		**Ct. App. No. 20050406-CA**
Defendant/Appellant.	:	

Hakeem Ishola, under the penalty of perjury as provided in relevant United States Codes, deposes and states as follow:

1. I am a licensed attorney in Texas and Utah, and I am also licensed before the United States Supreme Court, and several United States District Courts and United States Courts of Appeal.

2. I have practiced criminal and immigration law since 1991. I have appeared in numerous criminal matters in federal/state courts and immigration courts Nationwide. I have appeared before United States District Courts and Court of Appeals throughout the Nation. I have litigated before the United States Supreme Court. I have successfully by myself or with other attorneys represented clients on serious criminal and deportation matters, including death penalty matters. I have lectured on criminal-immigration law, and have published numerous articles on criminal-immigration law, such as *Of Confrontation: The Right Not to be Convicted on the Hearsay Declarations of an*

Accomplice (1990 Utah Law Review); *Of Conviction and Removal: the Impact of New Immigration Law on Criminal Aliens* (Utah Bar Journal 1997); *INS v. St. Cyr: Supreme Court and Draconian Criminal Immigration Law* (Utah Bar Journal 2001); *Representing Detained Aliens*, to be published in Annual AILA Handbook (Summer 2005). I will be lecturing over 3000 immigration lawyers at the annual AILA summit to be held in Salt Lake City, Utah, this summer.

3. Some of my most recent successful, published, precedent-setting court cases include *INS v. Galvez-Letona* (10th Cir. 2001); *INS v. Insixignmy* (District Court, Utah, 2000); *State v. Mohi*, 901 P.2d 991, 1009 (Utah 1995); *State v. Rojas-Martinez*, 2003 UT App. 203 (Utah Ct. App. 2003); *Raul Cruz-Garza v. Ashcroft*, ___ P.3d __, 2005 WL _____, Case No. 04-9508 (10th Cir., 2/2/2005).

4. It has been my experience that most immigrants are not aware of the deportation consequences of their guilty pleas until they receive a detainer from the DHS and a notice to appear indicating commencement of deportation proceedings. I have inherited hundreds of cases from criminal defense lawyers in Utah and Texas where non-citizens were advised to plead guilty to clearly deportable offenses because the criminal defense lawyers are not current on the state of immigration laws. This is particularly true when the non-citizen is told he or she would only serve 30 days in jail or less and will be released by the criminal court. Most non-citizens, in my experience, are not aware of what crimes constitute an "aggravated felony" under federal law. Nor are most criminal defense lawyers aware that certain misdemeanors and felonies under state law may constitute an aggravate felony for federal immigration law purposes. Even the most seasoned criminal defense attorneys in Utah, who will take the time to consult an immigration lawyer before advising their clients to plead to certain minor offenses, are always baffled about what crimes constitute an "aggravate felony."

5. It has also been my experience that when an aline files an appeal of right to an appellate court, DHS will not initiate proceedings while the appeal is pending. However, if an alien files a post-conviction petition for relief, DHS treats such a petition as collateral proceeding and will initiate removal proceedings.

6. Further the affiant sayeth naught

DATED this 14th day of June, 2005.

Hakeem Ishola
Affiant

Addendum "F"

Relevant Constitutional Provisions, Statutes and Rules

USCA CONST Amend. V, Refs

Amendment V. Grand Jury Indictment for Capital Crimes; Double · · ·

THOMSON WEST

United States Code Annotated Currentness
Constitution of the United States
Annotated
➡ Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-incrimination; Due Process of Law; Just Compensation for Property (Refs & Annos)

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<This amendment is further displayed in five separate documents according to subject matter,>

<see USCA Const Amend. V-Capital Crimes>

<see USCA Const Amend. V-Double Jeopardy>

<see USCA Const Amend. V-Self Incrimination>

<see USCA Const Amend. V-Due Process>

<see USCA Const Amend. V-Just Compensation>

Amendment V. Grand Jury Indictment for Capital Crimes

Effective: [See Text Amendments]

United States Code Annotated Currentness
Constitution of the United States
Annotated
→ Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Effective: [See Text Amendments]

Amendment VI. Jury trials for crimes, and procedural rights

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions XXI through XXIX are contained in this document. For text of section, historical notes, and references, see first document for Amendment VI. For additional Notes of Decisions, see documents for Amend. VI, ante and post.>

Effective: [See Text Amendments]

Amendment VI. Jury trials for crimes, and procedural rights

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions XXX through XXXIII are contained in this document. For text of section, historical notes, and references, see first document for Amendment VI. For additional Notes of Decisions, see documents for Amend. VI, ante and post.>

Current through P.L. 109-52 (excluding P.L. 109-42, 109-43) approved 08-02-05
END OF DOCUMENT

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE • • •

Effective: [See Text Amendments]

Approx. 67 pages

THOMSON WEST

U.S.C.A. Const. Amend. XIV

United States Code Annotated Currentness

Constitution of the United States

Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

➡AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any

U.C.A. 1953, Const Art 1, § 12

West's Utah Code Annotated Currentness
Constitution of Utah
Article I. Declaration of Rights
➡Sec. 12. [Rights of accused persons]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Laws 1994, S J.R. 6, § 1, adopted at election Nov 8, 1994, eff Jan 1, 1995

CROSS REFERENCES

Rights of defendant, criminal procedure, see § 77-1-6.

LAW REVIEW AND JOURNAL COMMENTARIES

U.C.A. 1953, Const. Art. 1, § 24

WEST'S UTAH CODE ANNOTATED
CONSTITUTION OF UTAH
ARTICLE I. DECLARATION OF RIGHTS

➔Sec. 24. [Uniform operation of laws]

All laws of a general nature shall have uniform operation.

Current through end of 2005 First Special Session

END OF DOCUMENT

U.C.A. 1953 § 77-13-6

West's Utah Code Annotated Currentness
Title 77. Utah Code of Criminal Procedure
Chapter 13. Pleas (Refs & Annos)
➡**§ 77-13-6. Withdrawal of plea**

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

Laws 1980, c. 15, § 2; Laws 1989, c. 65, § 1; Laws 1994, c. 16, § 1; Laws 2003, c. 290, § 1, eff. May 5, 2003; Laws 2004, c. 90, § 91, eff. May 3, 2004.

HISTORICAL AND STATUTORY NOTES

Laws 2003, c. 290, rewrote this section that formerly provided:

"(1) A plea of not guilty may be withdrawn at any time prior to conviction.

"(2)(a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

"(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

Westlaw.

West's Utah Code Annotated Currentness
Title 78. Judicial Code
Part IV. Particular Proceedings
Chapter 35A. Post-conviction Remedies Act (Refs & Annos)
➡ Part 1. General Provisions

§ 78-35a-101. Short title

This act shall be known as the "Post-Conviction Remedies Act."

§ 78-35a-102. Replacement of prior remedies

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

§ 78-35a-103. Applicability--Effect on petitions

Except for the limitation period established in Section 78-35a-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

§ 78-35a-104. Grounds for relief--Retroactivity of rule

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.

§ 78-35a-105. Burden of proof

The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The respondent has the burden of pleading any ground of preclusion under Section 78-35a-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

§ 78-35a-106. Preclusion of relief--Exception

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78-35a-107.

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

§ 78-35a-107. Statute of limitations for postconviction relief

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 77-19-8, 78-12-35, and 78-12-40 do not extend the limitations period established in this section.

§ 78-35a-108. Effect of granting relief--Notice

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2)(a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

§ 78-35a-109. Appointment of counsel

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

§ 78-35a-110. Appeal--Jurisdiction

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78-2-2 or 78-2a-3.

Current through end of 2005 First Special Session
END OF DOCUMENT

Utah Rules of Civil Procedure, Rule 65C

C

West's Utah Court Rules Annotated Currentness
State Court Rules
Utah Rules of Civil Procedure (Refs & Annos)
Part VIII. Provisional and Final Remedies and Special Proceedings

→RULE 65C. POST-CONVICTION RELIEF

(a) Scope. This rule shall govern proceedings in all petitions for post-conviction relief filed under Utah Code Ann. § 78-35a-101 et seq., Post-Conviction Remedies Act.

(b) Commencement and Venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(c) Contents of the Petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(d) Attachments to the Petition. If available to the petitioner, the petitioner shall attach to the petition:

(1) affidavits, copies of records and other evidence in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's

case;

(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

(e) Memorandum of Authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(f) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(g)(1) *Summary Dismissal of Claims.* The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(2) A petition is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claims have no arguable basis in fact; or

(C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a petition is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(h) Service of Petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(i) Answer or Other Response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(j) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(k) Presence of the Petitioner at Hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(l) Discovery; Records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(m) Orders; Stay.

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(n) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Section 64-13-23 and Sections 21-7-3 through 21-7- 4.7 govern the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(o) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

[Adopted effective July 1, 1996.]

ADVISORY COMMITTEE NOTE

This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a